Filed 1/8/19 P. v. Obie CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUSTIN LOWELL OBIE, Defendant and Appellant.	A153952 (Lake County Super. Ct. No. CR948996)

Justin Lowell Obie was sentenced to a three-year term in county jail, with the final 90 days to be served on mandatory supervision. One condition of mandatory supervision requires him to submit any electronic communication devices under his control to search and seizure at any time. On appeal, Obie challenges this electronics search condition as unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and unconstitutionally overbroad.[1] He acknowledges that his trial counsel did not object to the condition, but argues that his constitutional claim presents a pure question of law and has not been forfeited, and that in any case his counsel was ineffective. His arguments lack merit, and we shall affirm.

[1] Our Supreme Court has accepted review of several cases addressing the reasonableness and constitutionality of electronic search conditions. (See, e.g., *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.)

FACTUAL AND PROCEDURAL BACKGROUND

A. *Context of Obie's Arrest*

The probation department's presentence investigation report provides the following context: "On December 1, 2017, at approximately 1845 hours, a deputy was dispatched to the Kelseyville Fire Department on the report of the defendant [i.e., Obie] . . . stalking an employee. The deputy contacted [the victim], who was crying and upset. She reported she was in fear for her life and the safety of those around her, such as her family and co-workers. She had applied for a civil harassment restraining order, earlier in the day, protecting her from the defendant, which had been approved. She reported she had met the defendant in 2012, while [she was] working as a firefighter intern at the Portland Fire and Rescue. They had previously exchanged emails and would talk while at work; however, they never had a dating relationship. The defendant indicated to the victim at that time he wanted to have a sexual relationship with her, she informed him she was not interested. She returned to California a short time later. In September 2017, she received a letter from the defendant at the Kelseyville Fire Department. She was terrified by the letter, due to the strange and sexual nature of it and as they had not spoken since 2012. She informed law enforcement of the letter. Her father contacted the defendant via phone and advised him to leave her alone. On November 25, 2017, the defendant was observed outside of the fire department for an extended period of time. As he began to approach a female firefighter, the Fire Captain contacted him. The defendant reported he needed to speak with the victim in person, and he would be in town for an undetermined amount of time. On December 1, 2017, the victim received flowers from the defendant, at her employment, as she was working her first shift after a week off. The victim was sent home from her shift, as co-workers were in fear for her safety. A short time later, the defendant was confronted by the victim's father at a bar down the street from the fire department. He left the bar after the confrontation. A co-worker of the victim contacted the defendant via text, implying he was the victim, the defendant reported he was at Highland Springs."

B. *Arrest and Charges*

We draw our summary of Obie's arrest from the trial testimony of the Lake County sheriff's deputy, who spotted Obie on the evening of December 1, 2017 at Highlands Spring recreational area. Obie was walking away from a pickup truck with a cargo trailer attached to it, and the deputy asked him what he was doing, and whether he was carrying any weapons. Obie said he had a knife and a gun. The deputy retrieved a loaded semiautomatic pistol from Obie's coat pocket.

The deputy used Obie's keys to unlock the cargo trailer, which he searched. There he found a semiautomatic assault rifle with a detachable magazine, a tactical vest that contained a loaded 16-round magazine for the pistol and three loaded 10-round magazines for the rifle, about 100 additional rounds for the pistol, and over 1,000 additional rounds of ammunition for the rifle. Neither the pistol from Obie's pocket nor the rifle in the trailer was registered to Obie.

The Lake County District Attorney charged Obie with possession of an assault weapon (Pen. Code,[2] § 30605, subd. (a), count 1), carrying a concealed firearm on his person (§ 25400, subd. (a)(2), count 2), carrying a loaded firearm in public (§ 25850, subd. (a), count 3), importing a large capacity magazine into the state (§ 32310, subd. (a), count 4), and possessing a large capacity magazine (§ 32310, subd. (c), count 5.) The court later granted the prosecutor's motion to dismiss counts 4 and 5.

C. *Trial and Sentencing*

The court excluded from trial all testimony and evidence related to stalking, ruling that such evidence had minimal probative value with respect to the firearms charges and risked prejudice and undue consumption of time.

The jury found Obie guilty on counts 2 and 3, and could not reach a verdict on count 1. The court declared a mistrial as to count 1, and at the retrial on that count, the jury found Obie guilty.

[2] Further statutory references are to the Penal Code.

In its presentencing report, the probation department described the context of Obie's arrest, as outlined above in section A, and also included the information that Obie was the restrained party in an Oregon protective order concerning his former wife and his three minor children. During his probation interview, Obie was asked if he would like to provide a statement to be included in the sentencing report, and he responded, "It happened like the police report said."[3] Asked whether he would comply with conditions of probation, should it be granted, Obie hesitated and then said, "I suppose so." Obie asked about options other than probation, and asked about his ability to leave the country while on supervision. He also asked that his firearms be returned to him, and probation explained that he was prohibited from owning or possessing any firearm. Obie reported that he was raised in Oregon and lived there most of his life, and had moved to Lake County in November 2017 to "reconnect with an acquaintance." Staff at the facility where Obie was detained in connection with this case reported that Obie had difficulty getting along with other inmates: he would wake them and challenge them to fights, and he was involved in physical altercations. He had a handwritten letter entitled "Cultivating Female Sexual Energy," which referred to a female correctional officer at the facility.

The probation department recommended a county jail prison sentence of three years and eight months, and recommended conditions to be imposed for any period of mandatory supervision ordered by the court. One of those conditions requires Obie to "waive his 4th Amendment right to reasonable search and seizure and shall submit his person, vehicle, place of residence or any other property, to include any electronic communications devices, under his control to search and seizure at any time during the term of his supervision by any probation officer or law enforcement officer, acting with or without a search warrant, probable cause or reasonable suspicion."

[3] The police report is not in the record, and it is not clear whether Obie was referring to the stalking, the arrest, or both.

At the sentencing hearing, Obie's counsel argued that the court should reduce the charges to misdemeanors, or grant Obie probation; barring that, the court should not sentence Obie to the maximum of three years, eight months. Obie's counsel said nothing about the conditions of any probation, or the probation department's recommended conditions of mandatory supervision.

The trial court denied probation, noting that defendant was in possession of a loaded, concealed firearm while being a restrained party in a protective order, and had over a thousand rounds of ammunition and an assault weapon. The court sentenced Obie to the upper term of three years in county jail on count 1 with concurrent three-year terms on the remaining counts. Concluding that there was "no basis to find that he's not eligible or not appropriate for a grant of mandatory supervision," the court ordered that the final 90 days of Obie's sentence be served on mandatory supervision, subject to the conditions recommended by the probation department.

Obie timely appealed, and here challenges only the requirement that while under mandatory supervision he waive his Fourth Amendment rights with respect to electronic communications devices under his control.

DISCUSSION

A. *Applicable Law and Standard of Review*

When a trial court sentences a defendant to a term in county jail under the Realignment Act (Stats. 2011, ch. 15), the court "shall suspend execution of a concluding portion of the term for a period selected at the court's discretion" except when "the court finds that, in the interests of justice, it is not appropriate." (§ 1170, subd. (h)(5)(A); see *People v. Griffis* (2013) 212 Cal.App.4th 956 [discussing provisions of the Realignment Act].) During the period selected by the court, the defendant is on "mandatory supervision," and is "supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." (§ 1170, subd. (h)(5)(B).)

We review the validity of the terms of mandatory supervision under the standards that apply to probation conditions. (*People v. Martinez* (2014) 226 Cal.App.4th 759,

763-764 (*Martinez*).) "In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety." (*Id.* at p. 764.) Further, "[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*Lent*, *supra*, 15 Cal.3d at p. 486.) Thus, when a condition relates to conduct which is not in itself criminal, such as the possession and use of electronic communication devices, the condition "is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Ibid.*)

The trial court's discretion in imposing conditions of supervised release is limited by constitutional principles, as well as by the *Lent* reasonableness standard. " 'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' ([*In re*] *Sheena K.* [2007] 40 Cal.4th [875,] 890 [(*Sheena K.*)].) 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153)" (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.)

We review the reasonableness of mandatory supervision conditions imposed by the trial court for abuse of discretion, and we review constitutional challenges de novo. (*Martinez*, *supra*, 226 Cal.pp.4th at p. 764, 765.) A defendant who fails to object to a condition on *Lent* reasonableness grounds in the trial court forfeits such a challenge on appeal. (*People v. McCullough* (2013) 56 Cal.4th 589, 594.) Failure to object to a condition on grounds of overbreadth likewise constitutes forfeiture of the challenge on appeal, except for a facial challenge that raises a pure issue of law and "is 'correctable

without referring to factual findings in the record or remanding for further findings.' " (*Sheena K., supra,* 40 Cal.4th at p. 887.)

B. *Analysis*

Obie asks us to strike the electronics search condition, claiming that because his constitutional challenge does not depend on the sentencing record he has not forfeited it, and further claiming that his trial counsel's failure to object to the electronics search condition constitutes ineffective assistance of counsel.

We begin with Obie's assertion that because his challenge to the overbreadth of the condition does not depend upon the sentencing record, he has not forfeited it and we should reach it even though no objection was made below. Obie relies on *Sheena K., supra,* 40 Cal.4th at page 887, for this argument, but unlike *Sheena K.*, Obie's challenge does not raise a pure question of law. Obie does not provide reasoned analysis to show that his case is similar to *Sheena K.* Instead, he claims that evidence of stalking, which is included in the probation report but was excluded at trial and which supports the search condition, is not properly considered at sentencing. But Obie ignores the fact that his trial counsel stipulated to the admission of the probation report into evidence for sentencing, and offered no evidence for the defense.

We disagree that Obie's trial counsel's failure to object to the electronic search condition constitutes ineffective assistance of counsel. To demonstrate ineffective assistance, Obie must show that his trial "counsel's representation fell below an objective standard of reasonableness[] [¶] . . . under prevailing professional norms" (*Strickland v. Washington* (1984) 466 U.S. 668, 688), and then must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) "To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, [the reviewing court] will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Obie does not point to anything in the record that shows why his trial counsel acted as he did, and there is no indication that trial counsel

was asked to explain his actions. We have no difficulty thinking of satisfactory explanations for counsel's failure to object: he may have reasonably determined to focus his argument on trying to persuade the judge not to follow the probation department's recommendation of a multi-year jail term for his client. Obie's counsel argued vigorously that Obie should receive a shorter time in jail or probation. In view of Obie's hesitation in telling the probation department that he would be willing to comply with probation conditions if probation was granted, Obie's counsel could reasonably have decided not to argue about the terms of any mandatory supervision.

Obie also fails to show a reasonable probability that the condition would have been stricken if his counsel had objected. Obie argues that the electronics search condition has no relationship to the crimes of which he was convicted or his future criminality, and is therefore unreasonable under *Lent*. He suggests that if only his trial counsel had raised this objection at the trial court, the condition would not have been imposed. Yet Obie concedes that the probation department's report describes Obie's unwanted attention to a firefighter, which ultimately led to his arrest, and the report states that Obie used email and text messaging to pursue that relationship.

Nor are we persuaded that the facts here are similar to those in *In re Erica R.* (2015) 240 Cal.App.4th 907, 910 or *In re J.B.* (2015) 242 Cal.App.4th 749, 756, where electronic search conditions were stricken as unreasonable under *Lent* in the absence of evidence connecting the defendants' use of electronic devices to their offenses or potential future criminal activity. Here, there is evidence that Obie used electronic devices as one means of stalking a firefighter, which led to his arrest; that he sent her unwanted messages of a sexual nature, including a letter she characterized as having a strange and sexual nature, which terrified her; that he moved from Oregon to California, heavily armed, to contact her in person five years after they had last spoken; and that she requested, and received, a restraining order against him. In these circumstances, we cannot say the trial court abused its discretion in conditioning Obie's mandatory supervision on an electronics search condition.

Obie provides only a cursory argument that the facts of his case do not justify the breadth of the electronics search condition. In large part, his overbreadth argument restates his objection to the reasonableness of the condition under the standards of *Lent*, which we addressed above. In addition, Obie relies on *In re Malik J.* (2015) 240 Cal.App.4th 896 to argue that we should strike the electronics search condition, but the case is inapposite. The search condition there was justified by the defendant's history of robbing people of their electronic devices and the need to determine whether a device found in his possession had been stolen. (*Id.* at p. 902.) The search condition here, in contrast, is justified by the need to monitor defendant's use of the devices. Further, although the search condition in *Malik J.* had a narrow purpose, the condition was far broader than the condition imposed on Obie, and the Court of Appeal modified it, but did not strike it (*id.* at p. 906), which is what Obie asks us to do here. Nor does Obie address the fit between the purposes of the restriction on his rights imposed by the search condition and the burden the restriction imposes on his rights. We conclude that Obie has not shown that the search condition is unconstitutionally overbroad.

Because Obie has not shown that his trial counsel's conduct was objectively unreasonable, or that it is reasonably likely that the sentence would have been different if his counsel had objected to the electronics search condition, Obie has not shown ineffective assistance of counsel.

DISPOSITION

The order appealed from is affirmed.

_____
Miller, J.

We concur:

_____
Kline, P.J.

_____
Stewart, J.

A153952, *People v. Obie*